Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1993

RICHARD H. HUNGER, LLOYD L. BETCHER and LAWRENCE F. POSSEHL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

AB, CD, EF, and GH, whose true and correct names are unknown, Plan Administrators, Fiduciaries, Named Fiduciaries, Committee Members and Trustees of the CLEVITE INDUSTRIES, INC. HOURLY RETIREMENT PLAN, THE PULLMAN COMPANY, and CLEVITE INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Richard A. Miller*
Paul Iversen
GORDON-MILLER-O'BRIEN
1208 Plymouth Building
12 South Sixth Street
Minneapolis, Minnesota 55402
(612) 333-5831

Matthew B. Newman
MATTHEW B. NEWMAN, P.A.
Suite 500
701 Fourth Avenue South
Minneapolis, Minnesota 55415
(612) 337-9590

Counsel for Petitioners

*Counsel of Record

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTION PRESENTED

WHEN PLAN PARTICIPANTS HAVE NO INTERRUPTION IN EMPLOYMENT, JOB DUTIES OR PLACE OF EMPLOYMENT, MAY A PLAN SPONSOR, THROUGH A FINANCIAL TRANSACTION SUCH AS AN ASSET SALE, DENY PLAN PARTICIPANTS AN EARLY RETIREMENT SUBSIDY PROTECTED BY CONGRESS UNDER SECTION 204(g) OF THE RETIREMENT EQUITY ACT OF 1984 FROM BEING ELIMINATED BY PLAN AMENDMENT?

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Richard H. Hunger, Lloyd L. Betcher and Lawrence F. Possehl, on behalf of themselves and all others similarly situated, petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment in Richard H. Hunger, et al. v. AB, et al., 12 F.3d 118 (8th Cir. 1993).

OPINIONS BELOW

The opinion of the Court of Appeals was reported at 12 F.3d 118, and is reprinted in the Appendix at p. A-1. The order denying a rehearing is not reported and is reprinted in the Appendix at p. A-10. The Opinion of the District Court has not been reported, and is reprinted in the Appendix at pp. A-11 through A-17.

JURISDICTION

The decision of the Eighth Circuit was filed on December 17, 1993 and the order denying the petition for rehearing was entered on January 21, 1994. The jurisdiction of this Court is evoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of ERISA § 204(g)(1) and (2); 29 U.S.C. § 1054(g) (1) and (2).

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of-

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfied (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

STATEMENT OF THE CASE

Petitioners Richard H. Hunger, Lloyd L. Betcher and Lawrence F. Possehl were all employees of the Clevite Industries, Inc. ("Clevite"), Engine Parts Division in Lake City, Minnesota and members of and represented by Local Lodge 650 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Local 650"). As union employees of Clevite, the employees were covered by the Clevite Industries, Inc. Hourly Retirement Plan (the "Plan"). The Plan provided for a normal retirement benefit payable at age 65. The Plan was a defined benefit plan. Qualified participants who retired before age 65 under the Plan were entitled to a normal retirement benefit reduced by .5% per month for each month before the participant's 65th birthday. The Plan, however, included an early retirement subsidy which had been bargained between Local 650 and Clevite. This subsidy enabled Plan

participants to retire before age 65 with a normal retirement benefit reduced by only .2% per month, under certain circumstances, basically providing that persons 55 or over with 10 or more years of service with the company would be eligible for the early retirement subsidy.

On February 17, 1987, JPI Merger, Inc., a subsidiary of JPI Industries, Inc. ("JPI"), purchased the assets of the Clevite Engine Parts Division. The purchase agreement between Clevite and JPI required JPI to provide substantially the same retirement benefits as those Clevite had provided. Specifically, paragraph 21(b)(ii)(B) of the purchase agreement states:

> Except with respect to the 401-k plan, transferred employees not described in the preceding paragraph [pertaining to salaried-transferred employees] who, as of the closing date, are participants in pension plan shall become participants in one or more retirement plans established by Buyer which provide retirement benefits substantially similar to benefits which such transferred employees were receiving as participants in the pension plan as of closing date.

Purchase agreement, Appendix at A-163. Paragraph 21(e) of the purchase agreement required Clevite to provide vesting credit for participant service with JPI. That paragraph states: "Seller shall provide transferred employees who are participants in the pension plans as of the closing date with credit for service with Buyer for purposes of vesting under the Pension Plans." Purchase agreement, Appendix at A-164. Paragraph 21(b) of the purchase agreement provided that "On the closing date Buyer will offer employment to or be responsible for severance of all of the employees of the Division (the "Transferred Employees")." Appendix at A-162.

JPI did not, however, purchase the assets of the Plan, which were retained by Clevite. JPI did not assume the Plan, rather JPI

started a new employee retirement plan. Muenkel Affidavit, ¶ 8, Appendix at A-288 and A-289.

The jobs of the employees of the Engine Parts Division did not change as a result of the asset purchase by JPI. The employees continued to perform the same jobs at the same location and operations were not interrupted. The bargaining unit remained the same, with essentially the same number and identity of employees. Muenkel Affidavit, ¶ 9, Appendix at A-289.

On February 14, 1987, the Clevite Industries Inc. Benefit Plan Committee formally amended the Plan. That amendment provided in pertinent part:

> 5. By adding the following new subparagraph 3.5(f) to the Plan immediately after subparagraph 3.5(e) thereof:
>
> (f) notwithstanding any other provisions of the Plan to the contrary, an Employee who is transferred to employment with J.P. Industries, Inc. . . . pursuant to the sale of the assets of the company's Engine Parts Division and who, at the time of transfer, had not completed ten Years of vesting Service or attained Normal Retirement Age shall receive credit for Vesting Service for each full year . . . in which he is employed by J.P.I., in accordance with the foregoing rules generally applicable to Vesting Service with an Employer. Such an individual's Termination of Vesting Service will be the date the individual terminates employment with J.P.I. Employment with J.P.I. will not be taken into account for purposes of determining Benefit Service or, except as provided above, for any other purposes under the Plan and thus, if an Employee described above completes ten Years of Vesting Service, the type and amount of benefit he will be entitled to shall be the type and amount of benefit

> he otherwise would have been entitled to at the time of transfer if he then had completed ten years of Vesting Service. A transferred Employee who had completed ten years of Vesting Service or attained Normal Retirement Age prior to the time of transfer shall be entitled to the same type and amount of benefit he was entitled to at the time of the transfer.

Third Amendment of Imperial Clevite Inc. Hourly Retirement Plan, Appendix pp. A-108 and A-109.

In July 1987, the Pullman Company ("Pullman") acquired the assets of the Plan as a result of purchasing the stock of Clevite. Pullman informed the Plan Participants by memorandum dated August 1988, that their benefits would be frozen and their accrued benefits would be fully vested. This memorandum was silent as to the Plan participant's rights to receive the early retirement subsidy. The Plan participants were not aware that these subsidies were in danger. Muenkel Affidavit at ¶ 10, Appendix p. A-289.

Pullman also sent the Plan participants individual statements, along with a document entitled "Supplemental Administrative Information Engine Parts Division Retirement Plans". The statements showed each participant's retirement benefit under various circumstances, but did not include the early retirement subsidy. Instead, the statements indicated that early retirees would have their benefit reduced by a full .5% per month for each month they were under age sixty-five. Muenkel Affidavit at ¶ 11, Appendix p. A-289.

Pullman has refused to pay the early retirement subsidy. Pullman asserts that the plan participants are ineligible to receive the unreduced early retirement benefit if they did not meet the age and service requirements before the Engine Parts Division asset sale to JPI. Muenkel Affidavit at ¶ 12, Appendix p. A-289.

The Plan participants have, through no fault of their own, been unlawfully deprived of benefits they bargained for. This denial of the subsidized early retirement benefits is a violation of ERISA § 204(g).

Petitioners filed suit in U.S. District Court for the District of Minnesota alleging a violation of § 204(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(g). The District Court had jurisdiction over this suit pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, specifically ERISA, 29 U.S.C. § 1001 et. seq. ERISA provides that District Courts of the United States have jurisdiction over suits to enforce its provisions. 29 U.S.C. § 1132(e)(1).

Petitioners and Respondents filed cross-motions for summary judgment. On June 30, 1992, the District Court granted Respondents' motion for summary judgment. The District Court ruled that ERISA § 204(g) did not protect Petitioners, holding that the Petitioners' continued employment in the same jobs, represented by the same union, in the same location, after the asset sale pursuant to an agreement guaranteeing substantially the same benefits to employees after the sale, did not constitute employment sufficient to allow Petitioners to qualify for the early retirement subsidy.

Petitioners appealed to the Eighth Circuit Court of Appeals. On December 17, 1993, the Eighth Circuit affirmed the District Court, agreeing that the uninterrupted employment of the Engine Parts Division Employees was not sufficient to retain Petitioners' rights to an early retirement subsidy. In so ruling, the Eighth Circuit distinguished the decision of the Third Circuit in Gillis v. Hoechst Celanese Corp, 4 F.3d 1137 (3rd Cir. 1993), because in that case the purchase agreement had required that all employees of the selling company be hired by the purchasing company and that benefits remain the same for those employees after the sale. The Eighth Circuit contended that no such provision was in the purchase agreement in this case. The purchase agreement in this

case, however, did provide that all employees of the Engine Parts Division were to be hired by JPI, that substantially similar benefits would be provided, and that Clevite would give vesting credit to the employees for their service at JPI. Accordingly, Petitioners petitioned for a rehearing in the Eighth Circuit since the Eighth Circuit had overlooked these essential facts. The petition for rehearing was denied on January 21, 1994.

REASONS FOR GRANTING WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE APPLICABILITY OF ERISA § 204(g) TO EMPLOYEES WHO REMAIN IN THE SAME JOBS AFTER AN ASSET TRANSFER

While the Eighth Circuit was considering its decision in this case, the Third Circuit decided the case of Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3rd Cir. 1993). The Gillis case is factually indistinguishable from this case. The Third Circuit's decision in Gillis states that in 1989, Hoechst Celanese sold its PVC division to the American Mirrex Corporation. The plaintiffs involved in the Gillis case all continued in their same jobs at their same location with their same duties after the asset sale. From their perspective, the only thing that changed was the name of the company on their paychecks. In this case Clevite sold its Engine Parts Division to JPI and the plaintiffs continued in their same positions at their same location with their same responsibilities after the sale. To them, as well, the only change was the name of the company that employed them. In fact, Clevite continued to issue the employees' paychecks for over a year after the sale.

At the time of the Hoechst Celanese sale to American Mirrex, Hoechst had a retirement plan which gave early retirement benefits to anyone able to meet the "Rule of 85", i.e., their age plus years of service had to total 85. Thus, persons age 55 with 30 years of service with Hoechst were eligible for early

retirement. All of the plaintiffs in the Gillis case were not yet able to meet the rule of 85, but with continued service in that position might be able to do so in the future. The Gillis plaintiffs contended that § 204(g) of ERISA prevented Hoechst from taking away from plaintiffs the eligibility to qualify for early retirement benefits under the Plan. Section 204(g) states, in pertinent part:

> (1) The accrued benefit of a participant under a Plan may not be decreased by an amendment of the Plan . . .
>
> (2) For purposes of (1), a plan amendment which has the effect of -
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. . . .

29 U.S.C. § 1054(g) (emphasis added).

The issue for the Gillis court was whether, after the amendment to the Plan, the Gillis plaintiffs would have been able to meet the preamendment conditions for the early retirement subsidy. Defendants argued that since the plaintiffs now worked for American Mirrex, and not for Hoechst, they could no longer accrue the service necessary to reach the rule of 85 and qualify for early retirement benefits under the Plan. Plaintiffs contended, however, that § 204(g)(2) required Hoechst to give them the opportunity to meet the preamendment conditions for the subsidy,

after the amendment. The contentions of the plaintiffs and defendants in this case are exactly the same as the contentions in Gillis.

The Third Circuit in Gillis found that § 204(g) could plausibly be interpreted either the way plaintiffs or defendants in that case contended it should be interpreted. The Court found, therefore, that the statute was ambiguous and must be interpreted by the Court to determine which of the contentions best reflected the intention of Congress in enacting the Retirement Equity Act in 1984, which added subsection (2) to ERISA § 204 (g).

To determine the intent of Congress in adding this language to the statute, the Third Circuit examined the legislative history of § 204(g), and interpretations of parallel sections of the Internal Revenue Code by the IRS. The Third Circuit noted that one of the sponsors of the Retirement Equity Act explained the legislative intent in this way.

> "A plan is not to be considered . . . to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of termination of a plan, meets the requirements for a subsidized benefit. . . . *by sharing in additional plan assets which otherwise would revert to the employer, employees nearing early retirement at plan termination who later meet the plan's early retirement conditions receive an immediate benefit* . . . [of] increased retirement equity."

Gillis, 4 F.3d at 1145, Note 7 (quoting 130 Congressional Record H 8763 (Daily Ed August 9, 1984) (remarks of Representative Roukema, Ranking Minority member of House Subcommittee on Labor Management Relations) (emphasis added by Gillis court)).

The Third Circuit also noted that the IRS had ruled that an employer would not satisfy all its liabilities under Internal

Revenue Code § 411 (the parallel provision in the Internal Revenue Code to ERISA § 204) unless they had set aside funds to finance the early retirement subsidies of eligible persons who could qualify for the benefit after the termination of the plan. See Revenue Ruling 85-6, quoted at Gillis, 4 F.3d at 1145.

The Third Circuit thus concluded

> that if Hoechst had continued to employ plaintiffs after terminating its early retirement plan, plaintiffs would be able to qualify for early retirement benefits at a later date by meeting the plan's pretermination requirements. We conceive of no obvious reason why this same result should not obtain when the employees continue in their same job for a successor employer.

Gillis, 4 F.3d at 1145-1146. Defendants argued that since Plaintiffs no longer worked for Hoechst, they could no longer accrue the service necessary to qualify under the rule of 85. Defendants contended that the critical issue for determining whether employees could continue to accrue service to later qualify for the preamendment conditions of the subsidy, was whether they continued to work for the plan's sponsor. That is precisely the claim of defendants in this case as well.

The Gillis Defendants supported their argument by quoting the legislative history of § 301 of the Retirement Equity Act:

> The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment), has not met the preamendment requirements.

Gillis, 4 F.3d at 1146 (quoting S. Rep. No. 575, 98th Cong., 2nd Sess, 28 (1984), reprinted in, 1984 U.S.C.C.A.N. 2547, 2574).

The Third Circuit then noted that "separation from service" was a term of art in ERISA which had been interpreted by the IRS. The IRS has stated,

> an employee will be considered separated from service . . . only upon the employee's death, retirement, resignation, or discharge and not when the employee continues in the same job for a different employer as a result of liquidation, merger, consolidation, etc., of the former employer.

Gillis, 4 F.3d 1146 (quoting Revenue Ruling 79-336).

The Third Circuit concluded that when Congress used the term "separation from service" in describing the circumstances which would eliminate employees' ability to meet the preamendment conditions of the early retirement subsidy after the amendment, they did so with the knowledge of the meaning given to that phrase in the context of ERISA and its parallel sections in the Internal Revenue Code. The Court concluded that continuing in the same job at the same location after the asset sale did not constitute a separation from service which would eliminate the ability of those employees to meet the preamendment conditions for the early retirement subsidy. Hoechst was required, therefore, to take the early retirement subsidy into account in determining the amount of funds to transfer to American Mirrex to cover the Hoechst liability under its plan.

The Eighth Circuit in this case was aware of the Gillis decision when it issued its decision. The Eighth Circuit expressly disagreed with the Third Circuit stating: "Because the plain language of § 204(g) applies only to a 'participant who satisfies ... the pre-amendment conditions for the subsidy,' we find it unnecessary to resort to the legislative history in order to decide the question presented under the facts of this case." Hunger v. A.B., 12 F.3d 118, 121 (8th Cir. 1993). The Eighth Circuit also

noted what it claimed to be a factual distinction between the cases stating:

> Moreover, Hoechst is factually distinguishable and therefore inapplicable to our analysis in the instant case. The sale of the division by Hoechst to American Mirrex was made pursuant to an agreement that American Mirrex would provide substantially the same employee benefits as those Hoechst had provided. Thus, the employees/plaintiffs were subsequently employed by the plan sponsor that assumed both the obligations and assets of the retirement plan.
>
> In contrast, the transfer of the Engine Part Division from Clevite to JPI in the instant case entailed no such agreements. JPI, the successor employer, assumed neither the obligations nor the assets of the plan. Instead Clevite later sold the plan to a third party, The Pullman Company. Thus, unlike the former Hoechst employees, the former Clevite employees ceased all employment with the sponsor of the plan."

Hunger, 12 F.3d at 121-122.

The supposed factual distinction between the cases simply does not exist. In this case, as in the Gillis case, Clevite had agreed with JPI that the employees would be hired by JPI, or JPI would be responsible for their severance, and that the employees would be hired with substantially similar benefits to those they enjoyed while they were employed by Clevite. The facts of this case are thus indistinguishable from the facts of the Gillis case. The facts regarding the purchase agreement, which the Eighth Circuit had apparently overlooked, were part of the record on

appeal and printed in the joint appendix submitted with appellant's brief and were pointed out to the court in plaintiff's petition for rehearing. Despite the fact that the court's factual distinction was shown to be incorrect, the Eighth Circuit denied a rehearing on the issue, placing the Eighth Circuit squarely opposed to the position of the Third Circuit.

The Third Circuit found no reason to eliminate employees' rights to continue to accrue credit toward reaching an early retirement subsidy if, as in this case, the employees continued in their same positions, at the same location, with the same job functions, but the assets of the employing division were sold to another employer. The Eighth Circuit found that the asset sale was determinative, eliminating any right of the plaintiffs in this case to accumulate credit toward the early retirement subsidy.

The basic disagreement between the circuits is over whether the Retirement Equity Act of 1984 is ambiguous. In both the Gillis and Hunger cases the plaintiffs contended that Section 204(g) prevents any reduction in their early retirement subsidy if they remain in their position until the required age and service are met. Plaintiffs in both cases quote the provision of Section 204(g) which states

> In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfied (either before or after the amendment) the preamendment conditions for the subsidy.

29 U.S.C. § 1054(g). The Third Circuit acknowledges that on its face, that language can plausibly be read to require that plaintiffs be allowed to qualify for the early retirement subsidy, after the asset sale. The Eighth Circuit contends that the language cannot plausibly be read to allow plaintiffs to accumulate credit after the asset sale, even though the purchase agreement required Clevite to give plan participants credit for time worked at JPI. The Third

Circuit, finding the language could plausibly be read to protect employee early retirement benefits, examined the legislative history of the Retirement Equity Act in order to determine the intent of Congress with respect to the protection of employee early retirement subsidies. The Eighth Circuit expressly refused to consider the legislative history, finding that it is clear that not working for the plan sponsor eliminates the right of an employee to accumulate credit toward the early retirement subsidy.

The Third Circuit approach is correct. The language of the Retirement Equity Act of 1984 can plausibly be read to require that a person who remains in the same position cannot be deprived of an early retirement subsidy by a plan amendment, even if that plan amendment is accompanied by a sale of the assets of the employer to another employer. The issue is what Congress intended to be necessary to eliminate an employee's ability to accumulate credit toward qualifying for the early retirement subsidy. The answer to that question is not stated in the statute, making resort to legislative history both appropriate and necessary. The Eighth Circuit's refusal to consider legislative history led it to a result which is demonstrably contrary to the intent of Congress. This Court should grant certiorari in this case to effectuate the intent of Congress to protect these employees and their early retirement subsidies.

The legislative history shows that Congress intended that early retirement subsidies could lawfully be reduced if the employee has not met the preamendment early retirement criteria at the time of "separation from service." Congress has carefully drafted a comprehensive and reticulated statute in ERISA. Nachman Corp. v. Pension Benefits Guaranty Corporation, 446 U.S. 359 (1980). The Internal Revenue service had interpreted "separation from service" as used elsewhere in ERISA before the Retirement Equity Act of 1984 was even considered by Congress. During that consideration, Congress stated that early retirement benefits could be removed if there was a separation from service before the employee had met the conditions of the plan. Congress

is presumed to have understood the meaning of that phrase as applied to ERISA when using the phrase to describe what was to occur after passage of the Retirement Equity Act. In other words, it was manifestly the intent of Congress that after the Retirement Equity Act of 1984, early retirement benefits for which employees had worked could not be taken away from them unless and until they actually stopped working at the same job in which they had begun to accrue the benefits, regardless of any corporate reorganizations or transfers of assets which might take place changing the identity of the employing entity.

What the Third Circuit found in Gillis is that it is the substance of the employees' continued employment which determines their eligibility to continue accruing credit to qualify for the early retirement subsidy. Clevite could not eliminate the early retirement subsidies of plaintiffs, and take that money for its own use, by amending the plan. The Third Circuit's analysis simply states that Clevite cannot do indirectly what it cannot do directly.

The value of the early retirement subsidies for which plaintiffs had worked did not simply disappear. In the multiple transactions of selling the Engine Parts Division to JPI and the Plan and its assets to the Pullman Company, someone received the value of those early retirement subsidies. The value of those subsidies were extracted from the employees who had worked years to accumulate them just as Congress intended would not happen by its enactment of the Retirement Equity Act of 1984. This Court should grant certiorari in this case in order to clarify the law under ERISA to comply with the intent of Congress that an employer may not take to itself the value of early retirement subsidies for which its employees had worked, either through plan amendments or plan amendments coupled with corporate reorganizations. The Third Circuit recognized the intent of Congress and properly applied Section 204(g), and this Court should grant certiorari in this case in order to reverse the Eighth

Circuit and recognize that the Third Circuit's interpretation is the one intended by Congress in enacting the Retirement Equity Act of 1984.

Defendants in this case argued that Clevite could have terminated all of the employees, eliminating any question that their early retirement subsidies would not be owed to them, since actual termination is a separation from service. Defendants argued that they should not be penalized for the "humanitarian" gesture of contracting with JPI to guarantee the employment of Clevite's employees. One of the benefits, however, of purchasing an existing company rather than starting up a new company is the ability to obtain both existing facilities and experienced, trained employees. JPI thus derived a benefit from purchasing Clevite's assets and hiring its existing employees. Suffice it to say, that Clevite clearly did not agree to accept less money for the sale of the Engine Parts Division in order to assure that its employees would be hired by JPI. Clevite and JPI recognized that the existing employee base was an asset of Clevite and contracted to transfer the employees along with the other assets of the company. In doing so, the parties agreed that the employees would continue to receive the same benefits and would continue to accrue credit toward the Clevite plan for time worked at JPI. Defendants chose to ignore the purchase agreement and amended the plan to give employees only a portion of what had been bargained for.

Moreover, had Clevite chosen to terminate all its employees, rather than allow JPI to continue their employment, Clevite would have faced serious questions of age and benefits discrimination. If the intent of the terminations would have been to eliminate the early retirement subsidies, the termination would have been prohibited by ERISA. The purchase agreement benefited both JPI and Clevite and allowed Clevite to remain in compliance with state and federal antidiscrimination laws. That decision is not an altruistic one for which they are now being punished, it is a rational business decision that has benefits for Clevite and

associated costs. This action seeks to prevent Clevite from accepting the benefits of selling a business with an existing employee base without paying the associated costs.

ERISA is a remedial statute which should be liberally construed to achieve its essential purpose. See, e.g., Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Hankin v. Northrop Corp., 921 F.2d 1118 (9th Cir. 1990). ERISA was enacted to protect employee retirement benefits, hence the name Employee Retirement Income Security Act. The Retirement Equity Act of 1984 was also passed to protect employee rights and benefits. Congress saw that some companies had early retirement programs, and that employees could work for years with an employer, planning to take advantage of the early retirement opportunity, only to have that opportunity taken away by an amendment to the plan. An employee could turn down offers from other companies in order to continue to accumulate credit toward that early retirement and see those plans crushed in an instant. Congress acted to prevent such occurrences. Employers may not amend a plan to eliminate early retirement subsidies, and apply that amendment to employees that had worked for years to accumulate the benefits. In passing the Retirement Equity Act, Congress explained that it would be permissible to eliminate early retirement subsidies if an employee had not met the preamendment requirements of the plan at the time the employee separated from service. Congress chose a term with a distinct and definite meaning under ERISA and the parallel sections of the Internal Revenue Code to describe the situation in which early retirement subsidies will be lost. Congress has thus spoken with clarity on the subject involved in this suit, and the Eighth Circuit's refusal to listen to Congress' direction should not be allowed to stand.

This is not an isolated situation. The exact same fact pattern has arisen in both the Gillis and Hunger cases. That situation has also been addressed by lower courts in at least three cases. See, Hollingshead v. Burford Equipment Company, 809 F.Supp. 906

(M.D.Ala. 1992); Lear Siegler Aerospace Products Holding Corp. v. Smiths Industries, Inc., 1990 U.S. Dist. Lexis 2887 (S.D.N.Y. 1990); and Berard v. Royal Electric, Inc., 1992 U.S.Dist. Lexis 8464 (D.R.I. 1992). In Hollingshead, the Court was presented with the information regarding the IRS interpretation of "separation from service" and thus found that the employees in that case must be allowed to "grow into" their early retirement subsidies after the transfer of the assets of the employer to another company, as the third circuit did in Gillis. In Lear Siegler, the court was not presented with the information regarding the IRS interpretation of "separation from service" and thus found that the employees in that case were not allowed to "grow into" their early retirement subsidies after the transfer of the assets of the employer to another company. The Berard court, in the same circuit as the Lear Siegler court, simply followed Lear Siegler without comment. This issue has already caused differing results in differing jurisdictions and is likely to arise again.

Each year asset transfers occur affecting many employees. See, e.g., Davis, Gerald F. and Stout, Suzanne K. "Organization Theory and the Market for Corporate Control" Administrative Science Quarterly, Vol 37, No. 4, p. 650 (December 1992) (Documenting the large number of takeovers of Fortune 500 companies over the last 10 years and noting that in most cases the same employees remain with the company after the takeover). Potentially, all employees that work for employers that undergo a corporate transfer could be affected by the decision in this case. As the law now stands, in the Eighth Circuit employee early retirement subsidies are not protected after a corporate transfer, in the Third Circuit they are, and in lower courts in other circuits there is similar confusion. Employee rights and benefits, protected by Congress through ERISA and the Retirement Equity Act of 1984, should not depend on the address of the employee or the employee's employer. Congress intended to protect employee early retirement subsidies unless and until the

employees left their positions. Congress intended to protect employees who continue in the same position at the same location after a transfer of the assets of the employer to another company. The effect of these corporate transfers on the ability of employees to take advantage of early retirement benefits which they have worked for years to obtain is an important issue facing the nation as a whole which potentially affects thousands of citizens of the United States. Congress has spoken on this matter as recognized by the Third Circuit, and as ignored by the Eighth Circuit. This Court should grant certiorari of this case in order to effect the intent of Congress and eliminate the judicial legislation undertaken by the Eighth Circuit in this case.

CONCLUSION

Facing factually indistinguishable cases, the Third Circuit and Eighth Circuit came to different conclusions as to the intent of Congress in passing the Retirement Equity Act of 1984. The correct interpretation of that Act is important to American corporations and the employees of those corporations. This Court should grant review of this important issue in order to clarify the eligibility of employees for benefits as the result of a corporate reorganization. The petitioners, Richard H. Hunger, Lloyd L. Betcher and Lawrence F. Possehl, therefore respectfully request this Court to grant a writ of certiorari to the United States Court of Appeals for the Eight Circuit to review the case of Richard H. Hunger, Lloyd L. Betcher and Lawrence F. Possehl, for themselves and all others similarly situated, v. AB, CD, EF, and GH, whose true and correct names are unknown, Plan Administrators, Fiduciaries, Named Fiduciaries, Committee Members and Trustees of the Clevite Industries, Inc. Hourly Retirement Plan, The Pullman Company, and Clevite Industries, Inc., 12 F.3d 118 (8th Cir. 1993).

Respectfully submitted,

GORDON•MILLER•O'BRIEN

By: Richard A. Miller
Paul W. Iversen
1208 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402
(612) 333-5831

MATTHEW B. NEWMAN, P.A.

Matthew B. Newman
Suite 500
701 Fourth Avenue South
Minneapolis, MN 55415
(612) 337-9590